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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1123

UNITED STATES OF AMERICA,

Petitioner,

v.

RALPH FEOLA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinions of the court of appeals (Pet. Apps. A and B) are reported at 486 F.2d 1339.

QUESTION PRESENTED

Whether proof of scienter is necessary to convict respondent of conspiracy to violate 18 U.S.C. Section 111.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. 371 provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both. If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

18 U.S.C. 111 provides in part:

> Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, respondent and three co-defendants were convicted of assaulting federal narcotics officers while the officers were engaged in the performance of their official duties, in violation of 18 U.S.C. 111, and of conspiring to commit that offense, in violation of 18 U.S.C. 371. Respondent was

sentenced to imprisonment for one to four years on the conspiracy count, to be followed by three years' probation on the substantive count; he was also fined $3,000 on the substantive count. The court below initially reversed respondent's convictions on both counts (Pet. App. A), but upon rehearing reinstated his conviction on the substantive count (Pet. App. B).

1. The basic case presented by the Government revolved around the testimony of Jeffrey Hall and Irwin Lightcap, both Special Agents with the U.S. Department of Justice, Bureau of Narcotics and Dangerous Drugs.

Agent Hall's testimony was that on August 21, 1972 he was introduced to one, MICHAEL FARR, who was respondent's co-defendant, by an informant and that he, Agent Hall, had a conversation with Farr regarding a drug transaction. (A, 4-5)

At this meeting on August 21, 1972 Agent Hall testified that Farr told him that the respondent, FEOLA, was Farr's connection for drugs. (A. 4-5)

Agent Hall testified further that he, Special Agent Lightcap and the informant, met with Farr in New York City ten days later on August 31, 1972 and that Farr was with the respondent, ROSA.

At this time, Agent Hall had with him a "flashroll" of $17,000 which was shown to the respondent, ROSA, and which was to be used to purchase a half kilo of pure heroin from Rosa and Farr's people. (A. 6-8)

The two agents, Farr, the respondent, ROSA, and the informant then drove to an apartment at 155 West 68th Street in the Borough of Manhattan where the alleged drug transaction was to take place.

Upon arriving at the apartment on the West Side the defendant, Farr, told Agents Hall and Lightcap that they were "finally going to get to meet Ralph." (A. 9) Subsequently, Agents Hall and Lightcap, the informant, Farr and the respondent, ROSA, were led into apartment No. 405, 155 West 68th Street and were let in by the respondent, ALSONDO. While Agent Lightcap remained in the front hall of the apartment, Agent Hall was led into a rear bedroom and entered said bedroom with Farr, Rosa, Alsondo and the informant. There on a bed Agent Hall observed an attache case which contained four (4) bags of white powder. (A. 9-10) Farr and Rosa left the bedroom while Alsondo, Agent Hall and the informant remained. A few seconds later, Alsondo walked out of the bedroom towards the front of the apartment. At this point in time, Agent Hall opened a closet in the bedroom and observed a man therein, later identified as the lessee of the apartment, tied and gagged. (A. 11) Agent Hall then drew his gun and walked out of the bedroom and on doing so he observed the respondent, ALSONDO, going towards Agent Lightcap, who was holding the flashroll of money, and Alsondo was reaching in his waistband in the middle of his back. Agent Hall testified that Alsondo was pulling a gun from his waistband. (A. 11)

Agent Hall shouted to Lightcap words to the effect that Alsondo had a gun, yelled "Federal Agents" and then disarmed Alsondo with the help of Agent Lightcap, in an ensuing struggle. (A. 11)

Subsequently, Farr, the respondents, ROSA and ALSONDO, were subdued, placed under arrest and the apartment was secured by Agents Hall, Lightcap and

other agents attached to the Bureau of Narcotics of Dangerous Drugs. (A. 15)

The respondent, FEOLA, was found in a closet in the front hall of the apartment three or four minutes after backup agents arrived in the apartment. (A. 41)

On September 1, 1972 at about 12:30 P.M., approximately 20 hours after his arrest, the respondent, FEOLA, gave what was characterized as a false exculpatory statement to an Assistant U.S. Attorney. Said statement was to the affect that he, FEOLA, had never been to the apartment before August 31, 1972 and that he knew none of the defendants who were arrested with him in said apartment. (A. 28)

Proof was offered by the Government to the effect that Feola indeed knew all of the defendants and he had been to the apartment before. (A. 29-32, 36)

Agent Lightcap testified that while standing with the flashroll in the front hall of the apartment Alsondo walked towards him and was reaching behind his back. Agent Lightcap observed Agent Hall with a gun in hand approaching Alsondo and yelling to Lightcap that Alsondo had a gun. (A. 22)

At the close of the evidence, the conspiracy count was submitted to the jury on the theory that an agreement among the defendants could be inferred, which encompassed a plan either to defraud the agents by selling sugar for $17,000, or to assault and rob the agents should the fraud be discovered (A. 43-44) The court also charged the jury with regard to the conspiracy count and the substantive count, without objection from defense counsel, that the government did not have to prove that the defendants knew that the victims of their assault were federal officers (A. 43, 46)

2. The court of appeals reversed the conviction on the conspiracy count. It ruled that although knowledge that the victim of an assault is a federal officer was not essential for conviction of a substantive charge under 18 U.S.C. 111, such knowledge was required to support a conviction for conspiring to assault a federal officer. In reaching that conclusion, the court followed the 1941 opinion of Judge Learned Hand in *United States v. Crimmins*, 123 F.2d 271, in which the Second Circuit had held that even though a defendant could be guilty of causing the interstate transportation of stolen securities without knowledge of their interstate transportation, such knowledge was required to support a conviction for conspiring to transport stolen securities in interstate commerce.

SUMMARY OF ARGUMENT

To obtain a conviction for conspiracy to violate 18 U.S.C. Section 111 the Government must prove scienter on the part of the actors.

There is no question that federal courts of appeals have uniformly recognized that scienter is not necessary in a prosecution for assaulting a federal officer. See *U.S. v. Ulan*, 421 F.2d 787 (A.A. 2) *U.S. v. Lombordozzi*, 335 F.2d 414, cert. denied 379 U.S. 914 and other cases cited in the Government's Brief.

The elimination of the requirement of knowledge in Section 111 serves to protect federal officers and also to provide a federal forum for a violation of Section 111.

As stated in *U.S. v. Perkins*, 488 F.2d 652, 654 (C.A. 1):

> As this court has recently stated, the legislative purpose behind Section 111 is 'to provide federal officers the protection of the federal courts while they are performing their duties. Burdening the Government with an obligation to prove knowledge can seriously impede this purpose' Citing *U.S. v. Longone*, 445 F.2d 636, 637 (1st Cir.) cert. denied, 404 U.S. 915.

It is respectfully submitted to this learned court that a different rule must apply to a conspiracy to assault federal officers.

ARGUMENT

IN A PROSECUTION FOR CONSPIRACY TO VIOLATE 18 U.S.C. SECTION 111, IT IS NECESSARY TO PROVE THE DEFENDANT'S KNOWLEDGE OF THE FEDERAL JURISDICTIONAL ELEMENT EVEN WHEN SUCH KNOWLEDGE NEED NOT BE SHOWN IN A PROSECUTION FOR THE UNDERLYING SUBSTANTIVE OFFENSE.

1. It is respectfully submitted to this learned court that the logical approach to the issue raised in the instant case is that rule of law enunciated in *U.S. v. Crimmins*, 123 F.2d 271 (2nd Cir. 1941) and followed in numerous cases.

A conspiracy involves an agreement to perform the offense or criminal act, and accordingly, involves a meeting of the minds of the actors. Applying simple logic to the instant case, it is submitted that in order

for the respondent to be convicted of the conspiracy to assault as distinguished from the substantive act of assault he must have: a) agreed to; b) assault; c) a federal narcotics agent. Such an agreement requires specific knowledge of the identity of the victim of the assault.

It can be argued that in a prosecution involving the interstate transportation of stolen goods and similar type crimes that knowledge of the federal element can be inferred from the scope of the acts performed and from the duration of the agreement to perform the substantive acts. In such cases, the *Crimmins* rationale has been followed. See *U.S. v. Vilhotti*, 452 F.2d 1186 (2nd Cir. 1971) cert. denied 406 U.S. 947 (1972), *U.S. v. Jacobs*, 475 F.2d 270 (2nd Cir. 1973). In a case such as the instant one, which involves a single act performed spontaneously and of short duration, the *Crimmins* rationale must be followed. Such an act as an assault is localized and amenable to control by both federal and state law enforcement agencies. Additionally, as in this case a conviction on the substantive count can be obtained.

The fact that specific intent is required for a conviction on a conspiracy count and not on a substantive count is consistent with reason. *U.S. v. Vilhotti*, 452 F.2d 1186 (2nd Cir. 1971) cert. denied, 406 U.S. 947 (1972).

2. A careful analysis of this court's decision in *U.S. v. Freed* 401 U.S. 601 reveals that what was involved was "a regulatory measure in the interest of the public safety" p. 609.

The concurring opinion in *U.S. v. Freed*, 401 U.S. 601, 610, is, it is submitted, dispositive of the issue in

the instant case. For there, Mr. Justice Brennan sets forth the requirement of *mens rea* and concludes at page 616:

> Second, the firearms covered by the Act are major weapons such as machineguns and sawed-off shotguns; deceptive weapons such as flashlight guns and fountain pen guns; and major destructive devices such as bombs, grenades, mines, rockets, and large caliber weapons including mortars, antitank guns, and bazookas. Without exception, the likelihood of governmental regulation of the distribution of such weapons is so great that anyone must be presumed to be aware of it.

CONCLUSION

Under traditional concepts of the common law, scienter is necessary to convict for conspiring to assault. The requirement of specific intent is supported by reason in the *Crimmins* doctrine. Accordingly, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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August, 1974.